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90-1218

Supreme Court, U.S.
FILED
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NO. _____

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

BENNY BAILEY, JERRY CALLOWAY, ISRAEL CASINONO, DONALD COLLIER, EMMETT COMBS, LABON V. COOK, VICTOR LOPEZ, SIDNEY ROBERTSON, CHARLIE SANDOVAL, C.L. SHEIGG, WILLIAM SQUARE, LINDSEY WILLIAMS, and PAUL WILLIAMS,

Petitioners,

vs

LYNN MARTIN, Secretary of Labor, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether a federal appellate court, when a controversy becomes entirely moot pending appeal so that review may not be had, must dismiss the appeal as moot, vacate the decision of the district court, and remand with directions to dismiss as moot, so that no res judicata effects attach to the district court's opinion, or whether the appellate court may merely dismiss the appeal as moot, thus permitting the judgment of the district court to remain in effect.

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NO. 90-1326

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

BENNY BAILEY, JERRY CALLOWAY, ISRAEL CASINONO, DONALD COLLIER, EMMETT COMBS, LABON V. COOK, VICTOR LOPEZ, SIDNEY ROBERTSON, CHARLIE SANDOVAL, C.L. SHEIGG, WILLIAM SQUARE, LINDSEY WILLIAMS, and PAUL WILLIAMS,

Petitioners,

vs

LYNN MARTIN, Secretary of Labor, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Benny Bailey, Jerry Calloway, Israel Casinono, Donald Collier, Emmett Combs, Labon V. Cook, Victor Lopez, Sidney Robertson, Charlie Sandoval, C.L. Sheigg, William Square, Lindsey Williams, and Paul Williams respectfully pray that a writ of certiorari issue to review the opinions of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 20, 1990 and October 2, 1990.

OPINIONS BELOW

The Report and Recommendation of the United States Magistrate recommending that the employees be compelled to submit to interviews is attached hereto as Appendix A, infra. The Memorandum Opinion and Order of the United States District Court for the Northern District of Texas is attached hereto as Appendix B, infra. The Judgment of the district court is attached hereto as Appendix C, infra. The opinion of the Fifth Circuit Court of Appeals denying Petitioners' motion to dismiss as moot and vacate is unpublished and is attached hereto as Appendix D, infra. The Fifth Circuit's opinion regarding Petitioners' petition for rehearing is also unpublished and is attached hereto as Appendix E, infra.

It should be emphasized that the only opinions at issue in this Petition are those issued by the Fifth Circuit Court of Appeals.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was rendered on August 20, 1990. Appellants' petition for rehearing was denied by the Fifth Circuit Court of Appeals on October 2, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The jurisdiction of the United States Court of Appeals for the Fifth Circuit was invoked pursuant to 28 U.S.C. §§ 1331 and 1346.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The decision of Fifth Circuit Court of Appeals is in direct conflict with at least five decisions of this Court: Duke Power Co. v. Greenwood County, 299 U.S. 259 (1936); United States v. Munsingwear, Inc., 340 U.S. 36 (1950); Parker v. Ellis, 362 U.S. 574 (1960); Preiger v. Newkirk, 422 U.S. 395 (1975); and Great Western Sugar Co. v. Nelson, 442 U.S. 92 (1978). Specifically, the decision of the Fifth Circuit Court of Appeals violates the following rule:

> The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss. That was said in Duke Power Co. v. Greenwood County, S.C., 299 U.S. 259, 267, to be "the duty of the appellate court." That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented by happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary.

Munsingwear, 340 U.S. at 39-40.

STATEMENT OF THE CASE

This Petition concerns the proper disposition of a case that becomes moot while pending appeal.

The controversy underlying this Petition arose out of the Secretary of Labor's attempt to compel interviews of employees as part of an establishment inspection under the Occupational Safety and Health Act. On October 4, 1989, the Secretary of Labor filed a complaint in the federal district court for the Northern District of Texas to enforce administrative subpoenas issued to thirteen employees of Trinity Industries, Inc. when they exercised their right under the Secretary's established policy and practice to decline to be interviewed by OSHA. On November 15, 1989, the district court issued an order to show cause why the subpoenas should not be enforced. On November 22, 1989, Petitioners filed a motion to dismiss in the district court explaining that the subpoenas were invalid because the Secretary had failed to follow her own twenty-year policy regarding the voluntary nature of employee interviews.

The district court referred the matter to the United States Magistrate, who held a hearing, received post hearing briefs, and issued a report recommending that the employees motion to dismiss be denied and that the administrative subpoenas be enforced.

The employees timely objected to the Magistrate's report, and sought review by the federal district court. On April 9, 1990, the district court issued a Memorandum Opinion and Order adopting the Magistrate's report, denying the employees' motion to dismiss, and ordering

that the subpoenas be enforced. Final judgment, ordering the employees to appear for interviews beginning at 3:00 p.m. on Monday, April 30, 1990, was entered on April 23, 1990.

On April 25, 1990, the employees filed both a Notice of Appeal and a Motion to Stay Enforcement of Subpoenas pending appeal. The district court denied this motion on the afternoon of Friday, April 27, 1990. The employees then filed an Emergency Application for Stay Pending Appeal with the Fifth Circuit Court of Appeals, which was denied on Monday, April 30, 1990. Due to the denial, the scheduled interviews were conducted pursuant to the April 23 Order of the district court.

The employees then filed a motion to dismiss with the Fifth Circuit Court of Appeals, requesting that court to vacate the judgment of the district court and to remand with instructions to dismiss as moot. The Secretary filed a motion to dismiss the appeal as moot. The Fifth Circuit denied the employees' motion and granted the Secretary's motion. See Appendix D. The employees' subsequent petition for rehearing also was denied. See Appendix E.

REASONS WHY THE WRIT SHOULD BE GRANTED

Article III of the United States Constitution provides that federal courts may adjudicate only actual, ongoing controversies between the litigants. North Carolina v. Rice, 404 U.S. 244, 246 (1971). To satisfy this "case or controversy requirement," an actual dispute must exist at all stages of review, not simply on the date the action is initiated. Deakins v. Monaghan, 484 U.S. 193, 199 (1988); Roe v. Wade, 410 U.S. 113, 125 (1973). Because

the administrative subpoenas issued by the Secretary of Labor were enforced, and the employee interviews conducted, during the pendency of the appeal, the appeal was rendered moot and the decision of the district court could not be reviewed by the United States Court Appeals for the Fifth Circuit.

Petitioners were denied their right to appeal. As such, the decision of the district court should not be accorded any preclusive or res judicata effects. Ratner v. Sioux Natural Gas Corp., 770 F.2d 512, 517 (5th Cir. 1985); United States v. Sarmiento-Rozo, 592 F.2d 1318, 1321 (5th Cir. 1979). Instead, the Fifth Circuit should have dismissed the appeal, vacated the judgment of the district court, and remanded the case to the district court with instructions to dismiss as moot. Ratner, 770 F.2d at 517; accord Munsingwear, 340 U.S. at 39; Duke Power Co., 299 U.S. at 267 (holding that "[w]here it appears upon appeal that the controversy has become entirely moot, it is the duty of the appellate court to set aside the decree below and to remand the cause with directions to dismiss" (emphasis added)); WJM-TV, Inc. v. City of Cleveland, 878 F.2d 906, 911-12 (6th Cir.), cert. denied, 110 S. Ct. 74 (1989); Aviation Enterprises, Inc. v. Orr, 716 F.2d 1403, 1407-08 (D.D.C. 1983); Sarmiento-Rozo, 592 F.2d at 1321 (explaining that this procedure "protects the parties from the prejudice that may flow from a standing judgment which has become unreviewable and removes any res judicata or precedential effect which the judgment might otherwise have"); Restatement of Judgments § 69(2) (1942)(providing that "[w]here a party to a judgment cannot obtain the decision of an appellate court because the matter determined against him is immaterial or moot, the judgment is not conclusive against

him in a subsequent action"), 13 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Civil § 3533.10 (1984 & Supp. 1990). According to the Supreme Court, this procedure "clears the path for future relitigation of the issues between the parties" and preserves the rights of all involved. Munsingwear, 340 U.S. at 40. This case was particularly apt for dismissal under the rule of Munsingwear and Duke Power because Petitioners did not seek to invalidate the already-conducted interviews. See Aviation Enterprises, Inc., 716 at 1407.

Because the Fifth Circuit did not follow this Court's longstanding procedure for disposing of cases rendered moot pending appeal, a writ of certiorari should be issued.

CONCLUSION

Pursuant to Rule 16.1 of the Rules of the United States Supreme Court, Petitioners request a summary disposition of this case (1) granting Petitioners' petition for writ of certiorari, (2) vacating the judgment of the Fifth Circuit Court of Appeals, and (3) remanding the case to the Fifth Circuit Court of Appeals with directions to vacate the judgment of the United States District Court for the Northern District of Texas and to remand the case for dismissal of Respondent's complaint.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ELIZABETH DOLE,	)	
Secretary of Labor,	)	
UNITED STATES	)	
DEPARTMENT OF LABOR	)	
	)	
vs.	)	CA3-89-2539-D
	)	
BENNY BAILEY, ET AL	)	

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE

Pursuant to the orders of reference the District Court has directed the magistrate to conduct a hearing and to make a recommendation. The pleadings on which the magistrate is to report are as follows:

1. Plaintiff's complaint filed on October 4, 1989, seeking a court order to enforce administrative subpoenas.

2. Plaintiff's motion to enter default against Defendant Victor Lopez filed on November 2, 1989.

3. Defendants' motion to dismiss filed on November 22, 1989.

4. Trinity Industries, Inc.'s Motion for Leave to Intervene filed on December 15, 1989.

5. Victor Lopez's motion for leave to set aside entry of default filed on December 18, 1989.

6. Plaintiff's petition to adjudicate Defendants in contempt filed on December 22, 1989.[1]

Statement of the Case: This action was instituted by the Secretary of Labor to obtain a court order requiring the named Defendants, employees of Trinity Industries' Maple Avenue plant, to appear pursuant to administrative subpoenas. The complaint was predicated on the

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[1]Included within the above motions are the responses filed by party opponents. Defendants' motion for continuance filed on December 18, 1989, is moot and accordingly is not considered in this report and recommendation. In addition the parties, pursuant to the magistrate's order, filed post-hearing briefs.

Defendants' alleged failure to appear on August 17, 1989, pursuant to the subpoenas served on August 2, 1989.

On November 15, 1989, the District Court entered its show cause order ordering Defendants to appear before the undersigned magistrate for a hearing on December 19, 1989, to show cause why they should not be required to comply with the administrative subpoenas.

The hearing was held as scheduled, at which Plaintiff appeared through counsel and presented the testimony of William A. Burke who sponsored Plaintiff's exhibits.

Some of the Defendants appeared in person and through their counsel Robert E. Rader. Mr. Rader also appeared as counsel for Trinity Industries, Inc. on its motion to intervene. Defendants and Trinity Industries presented the testimony of Defendants Bailey, Combs and Square as well as the testimony of Neil Forman and Tom

Evans, the plant manager at Trinity Industries' Maple Avenue plant. The magistrate took Trinity Industries' motion to intervene under advisement.

Findings and Conclusions: Before addressing the merits of the dispute raised in Plaintiff's complaint and the evidence presented it is appropriate to consider Defendants' motion to dismiss, Trinity Industries' motion for leave to intervene and Lopez's motion for leave to set aside entry of default.

1. Defendants' motion to dismiss - In the main Defendants' arguments in support of their motion are fact intensive, e.g. the fact an administrative subpoena was served on an employee does not establish as a matter of law that it was unreasonable (See Defendants' memorandum filed on November 22, 1989 at IV.A.6 at page 16). Their argument that OSHA is limited to interviewing a reasonable number of employees (Id. at

IV.A.5 at page 15) similarly raises issues of fact. Moreover, it is extremely doubtful that an individual employee has standing to raise such an issue. If anything it is an issue which may be properly raised only by the employer whose operations are the object of the inspection.

The only argument raised in their motion to dismiss which may be considered in the context of a motion to dismiss is their argument that OSHA is precluded as a matter of law from obtaining employee interviews under the compulsion of an administrative subpoena. Although Defendants' memorandum brief argues mightily for such a principle of law by analogy to other cases, the cases cited are inapposite. I am particularly concerned by counsel's failure to address the District Court's decision in McLaughlin, Secretary of Labor v. Trinity Industries, Inc., ____ F. Supp. ____, 1988, CCH OSHD ¶28,306 (M.D. Fla.

1988), aff'd 881 F.2d 1086 (11th Cir. 1989). Not only were the individual Defendants put on notice of that case in the Plaintiff's memorandum filed on October 6, 1989, and which was served on each, but Trinity Industries, which now seeks to intervene, was a party to that action and Mr. Rader, their counsel of record, was counsel of record for Trinity Industries in the Middle District of Florida. Although an attorney obviously need not agree with a prior opinion, which is only persuasive authority, he owes a duty of candor as an officer of the court to apprise it of the opinion, though he is free to argue as an advocate for his client that its rationale should not be followed or adopted.[2]

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[2]Plaintiff's conduct is hardly more commendable in this regard, given that the complaint and accompanying affidavit represents that Defendants failed to appear on August 17, 1989, and where the uncontroverted evidence establishes that the parties agreed that in discharging the subpoenas' obligations that each Defendant would be permitted to appear at the Maple Avenue plant on

The issue of candor aside, I believe that not only the persuasive weight of the court's opinion in McLaughlin, supra, but the express authority of the statute (29 U.S.C. §657(b)) establish that Defendants' argument is without merit and that their motion to dismiss should be denied.

2. Trinity Industries' motion for leave to intervene - "Putting on his hat" as counsel for Trinity Industries, Mr. Rader filed a motion to intervene on its behalf. This motion was taken under advisement at the hearing. Based in part upon the testimony presented I recommend that Trinity Industries, Inc.'s motion to intervene be denied.

The uncontroverted representations of counsel and the testimony at the hearing established that after the administrative subpoenas had been served on Defendants, and following communications with representatives of the

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August 21, 1989.

Occupational Safety and Health Administration, it was agreed that Defendant would be in compliance with the subpoenas by appearing individually at the Maple Avenue plant on August 21, 1989 - commencing at 1:00 P.M. Such ag[r]eement was with the full knowledge and acquiescence of Trinity !ndustries' representatives. Having previously agreed to the modification of the subpoenas' command, it is more than a little disingenuous for Trinity Industries to argue that enforcement would create a substantial disruption of its production lines, particularly where the employees were scheduled to appear sequentially rather than en masse. It is also settled law that the disruptions which might occur are insufficient to preclude enforcement of administrative subpoenas. See e.g. Southern Indiana Gas and Electric Co. v. Director, Etc., 522 F. Supp. 850 (S.D. Ind. 1981); Urick v. Donovan, 542 F. Supp. 82 (W.D. Pa. 1982).

The remaining bases for Trinity Industries' motion are premised on a claim that its interests may be adversely affected if it is not allowed to intervene. However, it should be remembered that this is merely a subpoena enforcement action to allow OSHA to obtain additional information in completion of its administrative inspection. Thus, the mere conjecture that information obtained, if the subpoenas are enforced, may provide some evidence of violations of OSHA regulations which possibly may result in an administrative action for violations of such regulations, is insufficient to allow Trinity Industries to intervene in this action.

3. Lopez's motion for leave to set aside entry of default - The motion was referred to the magistrate for determination and/or recommendation. It constitutes a non-dispositive motion which the magistrate may rule on. 28 U.S.C. §636(b)(1)(A). The magistrate orally granted

the motion at the hearing, which will now be memorialized in this recommendation.

FINDINGS AND CONCLUSIONS:

The evidence before the court at the hearing establishes the following facts:

In May 1989 William A. Burke, a safety specialist employed by the Occupational Safety and Health Administration (OSHA) was involved in the work-place inspection of Trinity Industries, Inc.'s plant located at 5101 Maple Avenue, Dallas, Texas, pursuant to an inspection warrant issued by the undersigned magistrate on November 17, 1988 (See Magistrate's Docket No. 3-88-295M), thereafter upheld by the District Court in CA3-89-016-H and CA3-89-488-H. In performing the inspection authorized under the warrant, Mr. Burke conducted a "walk-around" inspection of the plant facility which included speaking with employees of Trinity Industries,

Inc. Burke was personally accompanied by Neil Forman, Trinity Industries' corporate safety coordinator and/or by Tom Evans, the plant manager. From time-to-time Mr. Burke requested to interview an individual employee. When this occurred Trinity Industries' representative would introduce the employee to Mr. Burke, explain that Mr. Burke wished to speak to the employee, advise the individual employee that the decision whether to speak with Mr. Burke was the employee's decision alone, but that if the employee agreed to the interview that the employer representative would like to be present. As explained by Mr. Forman, Trinity Industries was desirous of having a representative present to assist in communication and clarification of matters brought up in the course of an employee interview. For his part Mr. Burke was of the opinion that the statements made by Trinity Industries' representative hampered and impeded his ability to

conduct interviews. As a result of this impression, Mr. Burke discontinued the "walk-around" inspection until he could confer with his supervisor, Mr. Reyna.

On the next day Mr. Reyna and Mr. Burke met with the representative of Trinity Industries at the Maple Avenue plant. At this time Mr. Forman reiterated what he, as the representative of Trinity Industries, told employees prior to an interview. Mr. Reyna advised that there was no problem in the statements made by the employer's representative, and Mr. Burke thereafter continued the inspection.

Although the evidence fails to establish the precise date of contacts between Mr. Burke and Defendants Bailey, Combs and Square, during the May 1989 inspection Mr. Burke asked each if he would consent to an interview. Defendant Bailey, being of the opinion that it was his decision as to whether to agree to be interviewed, declined

the request primarily because it interrupted his work. It is noteworthy that Mr. Bailey expressed no concern about Trinity Industries' representative being present, but was rather intimidated by the conduct and demeanor of Mr. Burke. Messrs. Combs and Square also declined to be interviewed because of the work interruption which it would cause.

In an effort to avoid disruption of operations Mr. Burke pointed out several employees whom he wished to interview. Trinity Industries' representative would identify the individual by name and contacted the employees for interview. One employee so selected was interviewed by Mr. Burke. As to the remainder, Trinity Industries' representative presented Mr. Burke with signed statements of the employees reflecting each's statement that he did not wish to be interviewed. Mr. Burke then attempted to obtain the home addresses and telephone numbers of those

who had declined interview, but Trinity Industries refused to divulge this information based upon its employees' privacy interests.

On August 2, 1989, Mr. Burke served each of the named Defendants with an administrative subpoena by personally delivering the subpoenas on Trinity Industries' plant manager, Tom Evans (See Plaintiff's Exhibits 3-15). The subpoenas directed each Defendant's appearance at OSHA's office in Irving, Texas, commencing at 9:00 A.M. on August 17, 1989. In turn Mr. Evans hand-delivered or mailed the subpoenas to each of the Defendants. After Messrs. Bailey, Combs and Square had received their subpoenas each initially went to his foreman, who in turn referred him to the plant manager. Defendant Bailey was particularly upset because in complying with the subpoena it would necessitate him driving to Irving, changing his clothes twice and keep him from "clocking in" at work. He

was also disturbed by the fact when first approached in May it was his understanding that whether he spoke with an OSHA representative was a voluntary decision which he could make. The testimony of Messrs. Combs and Square reflected similar concerns on their parts.

All of the Defendants met with Tom Evans and Trinity Industries' attorney, Robert Rader, for a meeting. At this meeting Mr. Rader advised the Defendants that while they might have a good basis for resisting the subpoenas, the easiest path would be for each to appear as subpoenaed. The fact that thirteen employees would be taken off the production line on a single day was a concern to Mr. Evans as well as to the affected Defendants. At or around his meeting Mr. Rader advised the Defendants that he would represent each of them individually.

Based upon the disruptive effect which requiring the Defendants to travel to Irving, Texas, would have Mr. Forman, Trinity Industries' safety supervisor, and OSHA's area director agreed that the situs of the appearances of the Defendants pursuant to the subpoenas would be changed to the plant location and that the appearance date would be continued until August 21, 1989.

On August 21, 1989, all of the Defendants except for two or three on leave were present at Trinity Industries' plant on Maple Avenue. By agreement with OSHA those subpoenaed employees who were not present on August 21, 1989, were to be made available on succeeding dates. On August 21, 1989, Defendant Benny Bailey was called to a room to be interviewed by Mr. Burke. Bailey was accompanied by Mr. Rader, and both Bailey and Mr. Rader advised Mr. Burke that Rader had been retained as Bailey's attorney and that Bailey wanted

Rader to be present. As explained by Mr. Bailey in his hearing testimony he did not fully understand the purpose of the subpoena and was also suspicious because he had been led to believe that an employee himself had the choice as to whether he would consent to an interview. When Bailey refused to be interviewed outside the presence of Mr. Rader, Mr. Burke replied "We're out of here" or words of that effect. Burke left the premises without attempting to interview any of the other subpoenaed employees, having been advised by Mr. Rader that he represented each and that each subpoenaed employee would request his presence during any interview.

On the afternoon of August 21, 1989, Defendant Bailey received a telephone call at home from a person who identified himself as an OSHA employee. The caller requested Mr. Bailey's home address, and when Bailey inquired why the information was sought the caller told

him it was because Bailey was going to be sued which Bailey perceived as a clear threat.

At the hearing conducted on December 19, 1989, each Defendant appeared through his counsel, Robert Rader, but only Defendants Bailey, Combs and Square appeared in person.

Neil Forman testified that he had been an observer of numerous OSHA plant inspections conducted at Trinity Industry facilities around the country and that on all occasions except in the recent past, OSHA followed a policy of allowing an individual employee the personal choice of whether he would submit to an interview by an OSHA representative.[3]

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[3]At the hearing Mr. Rader on behalf of the Defendants and in support of Trinity Industries' motion to intervene requested that Mr. Jerry Riddles be permitted to testify at the evidentiary hearing. On the date of the hearing Mr. Riddles was ill and unable to attend. He has now recuperated. I am of the opinion that his proffered testimony is cumulative of that of Mr. Forman and is

Based on the testimony of the Defendants who appeared at the show cause hearing it is clear that none understands the conflict of interest which exists in having Trinity Industries' attorney represent him individually as well. It is equally clear that Mr. Rader did not fully inform the testifying Defendants of the ramifications which his representation of both individual employees and Trinity Industries might have so as to constitute a knowing and understanding waiver of any possible conflict of interest.

CONCLUSIONS OF LAW:

As a preliminary matter it may be argued that Plaintiff is not entitled to enforcement of the administrative subpoenas in light of the fact that Defendant Bailey appeared as agreed and that Mr. Burke terminated his interview with Mr. Bailey after it was made clear that Mr. Rader, the attorney, would remain

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irrelevant to the issues presented.

throughout the interview and left without attempting to interview any of the other subpoenaed employees. Were this a contempt proceeding such argument would have merit, but it is rather an enforcement proceeding. Moreover, it is clear that the issues of whether Defendants are entitled to the presence of counsel and to be represented by Mr. Rader specifically remain in controversy and are appropriately addressed at this time.

As reflected above with reference to Defendants' motion to dismiss (pages 3-4, supra), Defendants claim that issuance of subpoenas for their appearances was unreasonable and contrary to law is without merit. Further, no evidence was presented at the evidentiary hearing which suggests that Plaintiff acted unreasonably in the methods followed to obtain their appearances.

In her post-hearing brief Plaintiff concedes that Defendants are entitled to have counsel present when they

appear in answer to administrative subpoenas (See Plaintiff's memorandum filed January 2, 1990, at pages 3-4), but argues that Mr. Rader, Trinity Industries' counsel, may not also represent them individually.

It requires no genius insight to apprehend the dynamics which are at work in OSHA's opposition to having Trinity Industries' counsel of record present when employee interviews are being conducted pursuant to administrative subpoenas. Were the shoe on the other foot and OSHA were seeking to have its representative present when Mr. Rader was interviewing Trinity Industries' employees in an effort to render legal advice, I am confident that Trinity Industries would not submissively accede to such a state of affairs. Indeed, it is unlikely that any attorney would agreeably submit to such a practice of allowing a representative of an actual or potential adversary to be present to look over the attorney's

shoulder as he renders legal services on behalf of his client.

Although the Secretary has not filed a formal motion to disqualify Mr. Rader as counsel for Defendants, in substance the issue joined is one of whether he should be precluded from representing the individual Defendants as they are interviewed by OSHA's representative based upon a conflict of interest. See In re Gopman, infra, at 265.

The pertinent ethical standard is Disciplinary Rule 5-105(C) which reads:

> "a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect on such representation on the exercise of his independent professional judgment on behalf of each (Emphasis added).

Although the Defendants are motivated by different factors than those of Trinity Industries in opposing

enforcement of the administrative subpoenas, their respective interests are wholly congruent in this regard. However, from that point the interests of the individual Defendants and those of Trinity Industries diverge.

The factors which are present in this case are strikingly similar to those at issue in In re Gopman, 531 F.2d 262, reh. den. 542 F.2d 575 (5th Cir. 1976). In Gopman the government was successful in its challenge to an attorney who sought to represent both a union which was the subject of a grand jury investigation and individual union officers who were subpoenaed to appear before the grand jury.

Although the testifying Defendants have professed to know of no safety violations which have occurred or are present at the Maple Avenue plant, their testimony is hardly dispositive since the questions of OSHA are yet unasked.

The potential conflict in attempting to represent both the employees and their employer in the context of an OSHA administrative inspection are patently obvious. In attempting to represent an individual employee an attorney's obligation is to insure that his client is fairly treated and to insure that his client fully complies with his obligation under the subpoena.[4] However, as an advocate for his other client, the employer, counsel's duty is to minimize the possibility that OSHA's investigation will disclose violations. The two interests cannot be harmonized for encouraging an individual's candor on the one hand may be inimical to the interest of the employer, but to suggest any less to an employee client may result in

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[4]There is absolutely no suggestion that individual employees would have a Fifth Amendment privilege in this context as compared to those union officers who were called to appear before the grand jury in Gopman.

the employee being further needlessly embroiled in the adversarial posture which OSHA has with the employer.

The canon is further breached in the present case because Mr. Rader has not fully disclosed the above and other aspects of joint representation to the individual Defendants. As noted above the testifying Defendants, largely unsophisticated and more concerned about their jobs and inconvenience occasioned by the subpoenas, do not understand and appreciate the term "conflict of interest" in this proceeding. Absent knowing waiver of the conflict, the canon prohibits joint representation.

There is also a public policy interest which militates against joint representation in this instance. A review of the legislative history, the statute and promulgated regulations evidences a concern that an employee not be retaliated against for providing information about work place violations. Among other things an interview may be

conducted in private. Obviously this is to insure a modicum of confidentiality and to preclude the premature disclosures of information during the investigative stages of an inspection. When an employee's attorney is present at the interview no breach of confidentiality will normally occur since the attorney is ethically barred from disclosing the contents of the communication. But if the attorney is to properly represent the interest of his other client, the company, he must be prepared to fully discuss all facets of information known with the company in rendering legal advice; if he fails to do so, he is not adequately performing as an attorney with undivided loyalty, but in discharging this obligation he would compromise his ethical duty to protect the employee's privilege.

If an attorney disclose the contents of the employee's confidential interview to the employer, a situation is presented which is pregnant with the

possibility for mischief. Apart from the possibility that the attorney might recommend against discharge of an employee who provided information adverse to the company's interest, a representative of the company may conclude that this constitutes an act of disloyalty and find some other pretext for terminating him. Retaliation claims are difficult enough, without creating the possibility that a breach of confidence, likely never discovered by the terminated employee, caused his discharge rather than tardiness or some other non-proscribed cause. Of course, when an employee appears as a witness in an administrative proceeding the probability of retaliation is much more obvious which would counsel a prudent employer to refrain from terminating him absent a good cause basis. The joint representation which Mr. Rader has attempted to pursue violates the prohibitions of DR 5-105,

and he should be disqualified from further representation of the Defendants when they appear for interview.

Even if it be assumed arguendo that Defendants have waived any conflict of interest, their right to counsel is not absolute and must give way to an overriding public interest. In re Gopman, supra at 268.[5]

Accordingly, although Defendants are entitled to be represented by counsel, any order enforcing the administrative subpoenas should expressly bar Mr. Rader or any other attorney who has represented Trinity Industries from appearing as counsel in Defendants' behalf.

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[5]There is no showing that the Defendants are incapable of hiring independent counsel. In this regard it is observed that Defendants' objection to Plaintiff's counsel's inquiry as to who was paying for the legal services rendered was sustained. If it were later determined that Trinity Industries was paying for such services, it would constitute a further factor which would compromise an attorney's ability to independently represent those persons whom he was retained to represent.

4. Petition to Adjudicate Defendants in Contempt of Court - With one last heavy-handed bureaucratic swipe Plaintiff seeks to have those Defendants who did not personally appear on December 19, 1989, held in contempt of court. Although the Secretary correctly observes that the District Court's order filed on November 15, 1989, directed all Defendants to appear in person for the show cause hearing, she has not been prejudiced in any respect by their physical absence. Specifically Plaintiff's counsel did not call any Defendant as a witness at the hearing, nor is there any showing that Plaintiff was prevented from presenting all relevant evidence as a result of their non-appearance. Further, the affected Defendants did appear through counsel who represented that he had informed each that his appearance

was not required, which constitutes a further defense to any possible contempt of court.[6]

It is not without irony that the Secretary has pursued with such litigative vigor employees of Trinity Industries, the very persons which OSHA was designed to protect, who are in essence mere pawns in the on-going litigation ware which OSHA and Trinity Industries have waged across the United States. See e.g. McLaughlin, Secretary of Labor v. Trinity Industries, Inc., supra; Donovan v. Mosher Steel Div. of Trinity Industries, Inc., 791 F.2d 1535 (11th Cir. 1986), after remand 876 F.2d 1485 (11th Cir. 1989); Donovan v. Trinity Industries, Inc., 824 F.2d 634 (8th Cir. 1987). In firing this last salvo Plaintiff's counsel have surely not endeared OSHA to the

---

[6]Plaintiff's counsel also opposed Defendant Victor Lopez's motion to set aside entry of default, notwithstanding the concession that the act of setting aside the default did not operate to Plaintiff's prejudice.

individual Defendants, nor have they persuaded me that their motion warrants the expenditure of any additional judicial resources.

RECOMMENDATION:

For the foregoing reasons it is recommended that the District Court enter its order denying Trinity Industries, Inc.'s motion to intervene, and denying Defendants' motion to dismiss, and dismissing Plaintiff's petition to adjudicate Defendants in contempt of court.

It is further recommended that the District Court enter its order and judgment granting Plaintiff's request to enforce the administrative subpoenas previously served on Defendants by requiring that the Defendants appear sequentially at Trinity Industries' Maple Avenue plant - as previously agreed to by the parties, and that such order expressly prohibit Mr. Rader and any other attorney who has represented Trinity Industries from representing the

Defendants or attending the OSHA interviews conducted pursuant to the administrative subpoenas.

It is further ORDERED that Defendant Lopez's motion to set aside default is granted.

The District Clerk shall transmit a copy of the recommendation to counsel for the parties.

SIGNED this 24th day of January, 1990.

/s/ Wm. F. Sanderson Jr.
UNITED STATES MAGISTRATE

A True Copy:

Teste:

Clerk of the United States Court for the Northern District of Texas, Dallas Division

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ELIZABETH DOLE, Secretary of Labor, United States Department of Labor	§	
Plaintiff,	§	Civil Action No.
vs.	§	CA3-89-2539-D
BENNY BAILEY, et al.,	§	
Defendants.	§	

MEMORANDUM OPINION
AND ORDER

Certain employees of Trinity Industries, Inc. ("Trinity") appeal various orders and recommendations issued by the U.S. Magistrate. Finding no error, the court affirms the magistrate and adopts his findings and recommendations.

I

In May 1989 William Burke ("Burke"), a safety specialist employed by the Occupational Safety and Health Administration ("OSHA"), conducted a workplace inspection of Trinity's Dallas plant.[1] Burke engaged in a "walk-around" inspection, whereby he toured the plant and on occasion stopped to talk with various Trinity employees. Burke was accompanied by Trinity's corporate safety coordinator, Neil Foreman ("Foreman"), and Trinity's plant manager, Tom Evans ("Evans"). When Burke requested to talk with a particular employee, Foreman and/or Evans would introduce the employee to Burke and then advise the employee that the employee could, but was not required to, speak with Burke. The

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[1]The inspection was authorized by a warrant issued by this court.

employees were also informed that a Trinity representative would be present at any interview.

Apparently disgruntled with the prospect of having a Trinity representative present at interviews, Burke discontinued the walk-around inspection until he could confer with his supervisor. Burke and his supervisor met the next day with a Trinity representative, and it was determined Trinity had not acted improvidently in making the aforementioned statements to employees. Burke thereafter continued his inspection. During the course of the inspection Burke asked defendants Benny Bailey ("Bailey"), Emmet Combs ("Combs"), and William Square ("Square") for an interview. Each declined. Burke then identified several additional individuals he wished to interview. One employee was interviewed; the remainder declined. Burke later attempted unsuccessfully to obtain the home addresses and phone numbers of the employees.

On August 2, 1989 Burke served each of the employees who had declined to be interviewed with an administrative subpoena directing each to appear for interviews at OSHA's office in Irving, Texas on August 17, 1989. Upon receiving their subpoenas, Bailey, Combs, and Square objected to Trinity representatives, conveying their understanding that the decision whether to consent to an interview was voluntary. All affected employees then met with Evans and Robert Radar, Esq. ("Radar"), Trinity's corporate attorney. Radar advised the employees that the path of least resistance was to appear as ordered. Radar additionally informed them that he would represent each employee individually. In order to avoid disruption of Trinity's work force, Foreman and OSHA's area director agreed to change the location of the interviews to Trinity's Dallas plant, and rescheduled the interviews for August 21, 1989.

Each of the subpoenaed employees, with exceptions not relevant here, was present at the plant on August 21. Burke initially called Bailey to a room to be interviewed. Radar accompanied Bailey and informed Burke that Radar was Bailey's attorney and would be present during the entirety of the interview. Burke objected. When Bailey refused to be interviewed outside the presence of Radar, Burke stated, "we're out of here" and left without attempting to interview any additional employees. Bailey received a call from an OSHA representative later that day informing him he was going to be sued.

On October 4, 1989 the United States Secretary of Labor (the "Secretary") filed this action against each of the subpoenaed defendants, seeking to enforce the August 2, 1989 subpoenas. Numerous motions followed. Pursuant to 28 U.S.C. § 636(b), the court subsequently referred the following matters to the magistrate for recommendation

and/or determination: (1) the Secretary's complaint seeking enforcement of the subpoenas; (2) the Secretary's November 2, 1989 motion to enter default against defendant Victor Lopez ("Lopez"), (3) defendants' November 22, 1989 motion to dismiss; (4) Trinity's December 15, 1989 motion for leave to intervene; (5) Lopez' December 18, 1989 motion to set aside entry of default; and (6) the Secretary's December 22, 1989 motion to hold defendants in contempt of court. The magistrate entered his report and recommendations on January 24, 1990, recommending that the motions to dismiss, to intervene, and to hold defendants in contempt be denied. The magistrate further recommended that the subpoenas be enforced and granted Lopez' motion to set aside entry of default. The magistrate also expressed grave concern with Radar's dual representation of Trinity and defendants,

and recommended Radar be prohibited from further representation of the defendants.

Defendants now appeal, contending the magistrate erred in denying their motion to dismiss and Trinity's motion to intervene, and further contending no conflict relating to Radar's representation exists.[2] The Secretary has responded.

II

A

The court initially considers whether the magistrate erred in denying defendants' motion to dismiss. Because the motion to dismiss is case dispositive, the court engages

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[2]The Secretary has challenged neither the magistrate's denial of the motion to hold defendants in contempt nor his order setting aside the entry of default. The court discerns no error in the magistrate's rulings and affirms those rulings to the extent they are the subject of objection.

in de novo review of the magistrate's findings and recommendation. See 28 U.S.C. § 636(b)(1)(B).

Defendants base their motion to dismiss on the argument that employees cannot be compelled to submit to interviews. According to defendants, language in OSHA's Field Operations Manual stating that interviews are to be "[a] free and open exchange of information between the CSHO and employees"[3] compels the conclusion that OSHA maintains a policy of voluntary interviews. Thus, the argument goes, because OSHA has an internal policy of voluntary compliance, the Secretary cannot now alter that policy by issuing subpoenas without resort to the notice and comment procedures of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553. The Secretary responds that OSHA's Field Operations Manual

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[3]The entire sentence reads: "A free and open exchange of information between the CSHO and employees is essential to an effective inspection."

is not subject to the APA because it is a typical agency staff manual.

The court does not consider the statement in OSHA's Field Operations Manual to require that all employee interviews be conducted on a voluntary basis. Such a strict regulation appears nowhere in the Manual and cannot be fairly divined from the language on which defendants rely. The court instead considers the policy of conducting only interviews to which employees voluntarily consent, to the extent such a policy exists, to be at most an informal course of action typically followed by OSHA personnel. The statute under which this "policy" was promulgated expressly contemplates the issuance of subpoenas. Pursuant to 29 U.S.C. § 657(b), the Secretary is authorized in conducting investigations to "require the attendance and testimony of witnesses and the production of evidence under oath." OSHA's Field Operations Manual

provides additional authority for the issuance of administrative subpoenas. See Field Operations Manual, ch. III, reprinted in Empl. Safety & Health Guide (CCH) ¶7964.195 (1988).

In short, the court concludes the administrative subpoenas were authorized both by statute and OSHA's internal operating procedures. That the administrative subpoena mechanism has not heretofore been frequently utilized to compel employee testimony is not alone enough to infer an official OSHA policy of conducting interviews only with those employees who submit voluntarily. Were this so, an employee could, with impunity, insulate himself from being interviewed by denying an investigator's request. An employer could effectively hamper an OSHA investigation by instructing employees not to consent to interviews. In the acrimonious atmosphere in which these investigations appear to take place, it is not difficult to

predict such an impediment to the OSHA investigatory process.

The magistrate determined the subpoenas were authorized by § 657(b). The court agrees. In addition, the court concludes OSHA's own internal procedures authorized the issuance of the subpoenas. Accordingly, the issuing of the subpoenas, while not a common practice, did not alter any valid regulation or procedural rule promulgated by OSHA. Formal notice and rulemaking procedures were therefore not required.[4]

---

[4]To the extent defendants contend the subpoenas were unreasonable, the court rejects the contention. The court also finds no abuse of discretion in the magistrate's refusal to grant a continuance to allow defendants to present the testimony of Jerry Riddles ("Riddles"). Riddles' proffered testimony sheds no additional light on the issues before the court.

B

Having concluded the defendants were not entitled to a dismissal of the Secretary's action, and that the administrative subpoenas were authorized, it necessarily follows that the Secretary is entitled to enforce the subpoenas. The remaining questions are three: (1) when and where the interviews should take place; (2) whether Trinity should be granted leave to intervene; and (3) whether Radar should be disqualified from representing defendants.

As to the first two questions, the court notes only that the Secretary must comply with 29 U.S.C. § 657(a)(2). This necessarily means the interviews must be conducted so as to not create a substantial disruption of Trinity's workforce. The parties should first be given the opportunity mutually to agree to a time and place acceptable for all concerned. Failing that, the court will

decide the matter. Assuming no substantial disruption will occur, Trinity's stated basis for intervention falls away.

Regarding the third question, the court adopts the magistrate's recommendation that Radar be barred from representing the defendants. For Radar seriously to suggest there is no conflict of interest is beyond reason. As counsel for Trinity, Radar has an obligation to protect the interests of Trinity. Allowing Radar to further this obligation by representing Trinity employees being interviewed for the express purpose of uncovering possible OSHA violations by Trinity would sanction the purest form of conflict. This the court declines to do.[5]

III

For the reasons stated, defendants' motion to dismiss and Trinity's motion to intervene are denied. The

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[5]In addition to finding the existence of a conflict, the court concludes no valid waiver under State Bar Disciplinary Rule 5-105(c) has occurred.

Secretary is entitled to enforce the administrative subpoenas. If the parties can mutually agree to an acceptable time and place for the employee interviews to take place, the parties shall submit a proposed enforcement order to be signed by the court. If the parties cannot agree, the court will designate a time and place for the interviews. Neither Radar nor any other attorney who represents Trinity shall represent the defendants in connection with this matter.[6]

SO ORDERED.

April 9, 1990.

SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE

[6]Defendants are entitled to be represented by other counsel if they desire. See 5 U.S.C. § 555(b).

A True Copy:

Teste:

Clerk of the United States Court for the Northern District of Texas, Dallas Division

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ELIZABETH DOLE, Secretary of Labor, United States Department of Labor	§	
Plaintiff,	§	Civil Action No.
vs.	§	CA3-89-2539-D
BENNY BAILEY, et al.,	§	
Defendants.	§	

JUDGMENT

The appeals from the recommendations of the United States Magistrate having come on for consideration; and a memorandum opinion having been entered on April 9, 1990; it is therefore ORDERED and ADJUDGED as follows:

1. that defendants' motion to dismiss this action be, and it hereby is, denied;

2. that the motion of Trinity Industries, Inc. to intervene in this action be, and it hereby is, denied;

3. that neither Robert E. Rader, Esq. nor any other attorney who represents Trinity Industries, Inc. shall represent defendants in connection with this matter; and

4. that defendants shall appear at the Occupational Safety and Health Administration, 525 South Griffin Street, Suite 602, Dallas, Texas 75202, at the following times to testify regarding the working conditions maintained by Trinity Industries, Inc., at 5101 Maple Avenue, Dallas, Texas 75235:

Name of Defendant	Time of Appearance
Benny Bailey	3:00 p.m., April 30, 1990
Jerry Calloway	3:30 p.m., April 30, 1990
Israel Casinono	4:00 p.m., April 30, 1990
Donald Collier	3:00 p.m., May 1, 1990
Emmett Combs	3:30 p.m., May 1, 1990
Labon V. Cook	4:00 p.m., May 1, 1990
Victor Lopez	3:00 p.m., May 2, 1990
Sidney Robertson	3:30 p.m., May 2, 1990
Charlie Sandoval	4:00 p.m., May 2, 1990
C.L. Sheigg	3:00 p.m., May 3, 1990

William Square	3:30 p.m., May 3, 1990
Lindsey Williams	4:00 p.m., May 3, 1990
Paul Williams	3:00 p.m., May 4, 1990

These times are subject to modification based upon a party's demonstration that the interviews as scheduled will cause a substantial disruption of Trinity Industries, Inc.'s workforce.

And it is further ORDERED that the United States Marshal or one of his deputies shall serve a copy of this judgment in accordance with applicable law.

Done at Dallas, Texas this 23rd day of April, 1990.

SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE

A True Copy:

Teste:

Clerk of the United States Court for the Northern District of Texas, Dallas Division

APPENDIX D

Filed August 20, 1990

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-1326

ELIZABETH DOLE, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Plaintiff-Appellee,

v.

BENNY BAILEY, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas

Before: GEE, JONES and BARKSDALE,
Circuit Judges.

(Filed August 20, 1990)

BY THE COURT:

IT IS ORDERED that the motion of appellants to dismiss the appeal, vacate the judgment of the district court and remand to the district court with instructions to dismiss as moot is denied.

IT IS FURTHER ORDERED that the motion of appellee to dismiss the appeal as moot is granted.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Fifth Circuit

APPENDIX E

Filed October 2, 1990

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-1326

ELIZABETH DOLE, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Plaintiff-Appellee,

v.

BENNY BAILEY, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING

(OCTOBER 2, 1990)

Before: GEE, JONES and BARKSDALE,
Circuit Judges.

(Filed October 2, 1990)

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Fifth Circuit

Supreme Court, U.S.
FILED
APR 3 1991
OFFICE OF THE CLERK

(2)

No. 90-1218

In the Supreme Court of the United States

OCTOBER TERM, 1990

BENNY BAILEY, ET AL., PETITIONERS

v.

LYNN MARTIN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court of appeals erred in denying petitioners' motion to vacate the district court's judgment, and to remand with instructions to dismiss, when petitioners' appeal became moot only because they had complied with the district court's judgment enforcing the Secretary of Labor's administrative subpoenas.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1218

BENNY BAILEY, ET AL., PETITIONERS

v.

LYNN MARTIN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. D1-D2) is unreported. The memorandum opinion and order of the district court (Pet. App. B1-B15) is unofficially reported at 1990 O.S.H. Dec. (CCH) ¶ 28,898. The judgment of the district court (Pet. App. C1-C3) is unreported. The district court's order denying a stay pending appeal (App., *infra*, 1a-3a) is unreported. The report, with recommendations, of the United States magistrate (Pet. App. A1-A32) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1990. A petition for rehearing was denied on October 2, 1990. Pet. App. E1-E2. The petition for a writ of certiorari was filed on January 2, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are thirteen employees of Trinity Industries, Inc.'s plant in Dallas, Texas. In May 1989, the Occupational Safety and Health Administration (OSHA), acting pursuant to a search warrant, undertook a safety compliance inspection of the plant. As part of the investigation, the OSHA compliance officer sought to interview a number of employees. When all but one of the identified employees declined the interviews, OSHA served them with administrative subpoenas. Pet. App. A10-A14, B2-B4.

The interviews required by the subpoenas were to take place at the plant on August 21, 1989. The employees came to the interviews accompanied by Trinity's attorney, who purported to represent them individually. When the employee at the initial interview insisted on the presence of Trinity's attorney as his counsel, the compliance officer objected and discontinued all the interviews. Pet. App. A16-A17, B4-B5.

2. On October 4, 1989, the Secretary of Labor filed an action in the United States District Court for the Northern District of Texas against each of the subpoenaed employees, seeking to enforce the administrative subpoenas. Pursuant to 28 U.S.C. 636(b), the court referred the matter to a magistrate. Pet. App. A1, B5. In response to a show cause order, petitioners filed a motion to dismiss, arguing that

the subpoenas were invalid. Trinity also filed a motion to intervene, asserting a need to protect against disruption from the interviews. *Id.* at A2-A9. After a hearing, the magistrate concluded that the subpoenas were valid. He therefore recommended that petitioners' motion to dismiss should be denied and that the subpoenas should be enforced. The magistrate also recommended against permitting Trinity to intervene in the case. Finally, the magistrate recommended that Trinity's attorneys not be permitted to represent the individual employees because of the obvious potential for conflict of interest. *Id.* at A31-A32; see *id.* at A3-A9, A18-A31, B6-B7.[1]

The district court, applying a standard of de novo review, adopted the magistrate's findings and recommendations. Pet. App. B1. The court concluded that both Section 8(b) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 657(b), and OSHA's internal operating procedures authorized the administrative subpoenas, and that these particular subpoenas were reasonable. Pet. App. B10-B11. Accordingly, it held that the Secretary was entitled to enforce the subpoenas. *Id.* at B12. The court directed that the interviews be conducted at a mutually convenient time and place acceptable for all concerned, *ibid.*, and barred Trinity's counsel from representing the employees. *Id.* at B13. Finally, the court ruled against Trinity's motion to intervene because the enforcement order stipulated that the interviews were to be conducted so as not to create a substan-

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[1] The magistrate also set aside the entry of default against one employee and recommended against the Secretary's motion to hold in contempt those employees who did not personally appear at the magistrate's hearing. Pet. App. A31-A32; see *id.* at A9-A10, A29-A30, B6.

tial disruption of the company's work force, thus obviating the stated basis for intervention. *Ibid.*

In its judgment of April 23, 1990, the district court incorporated these holdings and specified the time and place for each interview. All the interviews were scheduled to occur between April 30 and May 4, 1990, subject to modification upon a showing of substantial disruption to the company's work force. Pet. App. C2-C3. The district court denied a motion to stay enforcement of the subpoenas pending appeal, holding that petitioners were not likely to succeed on the merits and that a stay would not serve the public interest in workplace safety. App., *infra*, 1a-3a; see Pet. 5. On April 30, 1990, the court of appeals likewise denied a stay. App., *infra*, 4a. Petitioners then provided the subpoenaed testimony as scheduled. Pet. 5.

3. In the meantime, petitioners had filed a notice of appeal from the district court's judgment denying their motion to dismiss and enforcing the subpoenas. See App., *infra*, 5a-6a. Following completion of the interviews, petitioners moved to dismiss their appeal as moot and to vacate the judgment of the district court with directions to dismiss the case. The Secretary also moved to dismiss the appeal as moot, but opposed petitioners' motion to the extent that it sought to vacate the district court decision. In an unpublished order, the court of appeals summarily denied petitioners' motion to vacate and granted the Secretary's motion to dismiss the appeal as moot. Pet. App. D1-D2.

ARGUMENT

Petitioners seek this Court's review—indeed, summary disposition on the merits (see Pet. 7)—of their contention that the court of appeals erred in denying their motion to vacate the district court's judgment as moot, and to remand with instructions that the case be dismissed. Contrary to petitioners' contention, the principles articulated in *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), do not require a court of appeals to grant a contested motion to vacate a district court's judgment in the circumstances presented here—when a case has become moot on appeal only because the appellant has chosen to comply with the district court's order enforcing a subpoena for testimony.

1. In *Munsingwear*, this Court noted that "[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." 340 U.S. at 39. That practice, the Court explained, "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *Id.* at 40. In *Munsingwear*, the Court held that because the government had not availed itself of this procedure for vacating a lower court judgment in a case that had become moot while on appeal, the government was bound by principles of res judicata with respect to the underlying, unvacated judgment. *Id.* at 40-41.

The rationale of *Munsingwear* suggests an important qualification to the scope of that doctrine. *Munsingwear* protects a party against the res judi-

cata consequences of a judgment where the party was deprived of appellate review through the fortuity of mootness. But it is not necessary to afford that protection to the losing party when that party has chosen, while the case is on appeal, to take action rendering the case moot. This qualification is reflected in the language of *Munsingwear* itself: the Court referred to cases where review "was prevented through happenstance." More recently, in *Karcher* v. *May*, 484 U.S. 72, 83 (1987), the Court made a similar point in holding that "the *Munsingwear* procedure is inapplicable" where the controversy had ended because the losing party had abandoned its prosecution of an appeal. The Court distinguished that situation from a case in which "the controversy * * * become[s] moot due to circumstances unattributable to any of the parties." *Id.* at 83.

When mootness *is* attributable to the party challenging the judgment, the equitable principles underlying *Munsingwear* do not require protection of that party against the res judicata consequences of the judgment.[2] As the court explained in *United States* v. *Garde*, 848 F.2d 1307, 1311 (D.C. Cir. 1988):

> The distinction between litigants who are and are not responsible for the circumstances that render the case moot is important. We do not wish to encourage litigants who are dissatisfied with the decision[s] of the trial court "to have them wiped from the books" by merely filing an

[2] The *Munsingwear* procedure is not jurisdictional. See *National Union Fire Ins. Co.* v. *Seafirst Corp.*, 891 F.2d 762, 766 (9th Cir. 1989) ("The *Munsingwear* rule is neither statutorily nor constitutionally required. It is equitable in nature, designed to maintain fairness between litigants who have been denied what would otherwise be an opportunity to challenge a prior adverse decision.").

> appeal, then complying with the order or judgment below and petitioning for a vacatur of the adverse trial court decision.

To grant such a motion in these circumstances would enable a "litigant * * * to destroy the collateral conclusiveness of a judgment by destroying his own right of appeal." *Ibid.*, quoting 1B J. Moore, *Moore's Federal Practice* ¶ 0.416[6], at 543 (2d ed. 1984). See also *Cover* v. *Schwartz*, 133 F.2d 541, 546 (2d Cir. 1942), cert. denied, 319 U.S. 748 (1943); *Ringsby Truck Lines, Inc.* v. *Western Conference of Teamsters*, 686 F.2d 720, 721 (9th Cir. 1982).[3]

In line with those principles, several courts of appeals have refused to vacate a district court judgment, when a case became moot on appeal, "where the losing party deliberately mooted the question on appeal so as to destroy the preclusive effect of a final judgment below." *Garde*, 848 F.2d at 1310 n.6; see *Allard* v. *DeLorean*, 884 F.2d 464 (9th Cir. 1989); *United States* v. *Constangy, Brooks & Smith*, 851 F.2d 839, 842 (6th Cir. 1988); *Center for Science in the Public Interest* v. *Regan*, 727 F.2d 1161 (D.C. Cir. 1984); *United States* v. *Sweet*, 655 F.2d 54 (5th Cir. 1981); *United States* v. *Olson*, 604 F.2d 29 (8th Cir. 1979); cf. *Blackwelder* v. *Safnauer*, 866 F.2d 548, 550-551 (2d Cir. 1989); *Wisconsin* v.

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[3] Although *Ringsby* has been criticized, see 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3533.10, at 431-432 (2d ed. 1984), the Ninth Circuit continues to apply its principles. See *Scott* v. *Iron Workers Local 118*, No. 89-16001 (Mar. 20, 1991).

Baker, 698 F.2d 1323, 1330-1331 (7th Cir.), cert. denied, 463 U.S. 1207 (1983).[4]

In *Garde*, the court of appeals applied this principle in a context analogous to the present case. The Nuclear Regulatory Commission subpoenaed information from an attorney representing certain whistleblowers. When the attorney refused to comply, the agency brought an enforcement action in district court. The court denied enforcement and "advised the NRC that it must pursue less intrusive alternatives to obtain the information sought." 848 F.2d at 1308. While the NRC's appeal was pending, the NRC used less intrusive means to acquire substantially all the information it sought in the subpoena. It then moved the court of appeals to dismiss the case as moot and to vacate the judgment below. The court of appeals refused to do so, saying: "Appellant,

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[4] A related but distinct issue, not presented here, is whether settlement of a case on appeal requires the issuance of a *Munsingwear* order, at least if no party opposes a motion to vacate. Cf. p. 13, *infra*. The courts of appeals are divided on this issue. Compare *Long Island Lighting Co.* v. *Cuomo*, 888 F.2d 230, 233-234 (2d Cir. 1989) (dismissal and vacatur required where parties have agreed on settlement and vacatur of the decision below); *Federal Data Corp.* v. *SMS Data Prods. Group*, 819 F.2d 277, 279-280 (Fed. Cir. 1987) (same); *Kennedy* v. *Block*, 784 F.2d 1220, 1225 (4th Cir. 1986) (same); with *National Union Fire Ins. Co.*, 891 F.2d at 765-769 (remand to let district court determine whether to vacate where case mooted by settlement); *In re Memorial Hosp. of Iowa County, Inc.*, 862 F.2d 1299, 1301 (7th Cir. 1988) (vacatur not appropriate where parties have mooted case through settlement); *In re: United States*, No. 87-5383 (D.C. Cir. Mar. 8, 1991) (*Munsingwear* order not appropriate when losing party chooses to settle case rather than pursue an appeal, even when prevailing party supports the motion to vacate).

the losing party, has complied with the district court judgment and as a result, rendered the appeal moot. When 'the appellant complie[s] with the judgment, * * * the trial court's determinations ought to have the same conclusive effects that they would have if the appellant had not appealed at all.'" *Id.* at 1310 n.7, quoting 1B J. Moore, *Moore's Federal Practice* ¶ 0.416[6], at 543-544 (2d ed. 1984).[5]

2. This case is in the same mold. As in *Garde*, post-judgment compliance rendered the appeal moot[6] but mootness was not achieved "through happenstance," *Munsingwear*, 340 U.S. at 40, or circumstances "unattributable to any of the parties." *Karcher*, 484 U.S. at 83. Rather, petitioners chose to comply with the outstanding district court order, and eliminate the live aspect of the controversy. If petitioners were intent on preserving their right to appeal the underlying decision, all that was necessary was for one or more of the thirteen employees to "have refused to comply with the district court's order of enforcement * * * [and] have then risked

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[5] See also *United States* v. *Constangy, Brooks & Smith*, *supra* (post-judgment compliance with order to produce documents pursuant to FOIA after stay denials; appeal dismissed as moot, but motion to vacate denied); *EEOC* v. *St. Regis Paper Co.*, 717 F.2d 1302 (9th Cir. 1983) (post-judgment compliance with subpoena after stay denials; appeal mooted, but case not vacated); *United States* v. *Sweet*, *supra* (post-judgment compliance with summons after temporary stay; appeal dismissed as moot, but case not vacated).

[6] The case was plainly moot, because once petitioner had complied with the district court's judgment, there was no further relief that the court of appeals could have granted. See, *e.g.*, *Iron Arrow Honor Society* v. *Heckler*, 464 U.S. 67, 70 (1983) (per curiam); *United States* v. *Garde*, 848 F.2d at 1309.

civil contempt sanctions." *EEOC* v. *St. Regis Paper Co.*, 717 F.2d 1302, 1303 (9th Cir. 1983). If the reviewing court had ruled that the underlying order was erroneous, the employees would have enjoyed a complete defense to the imposition of civil contempt sanctions. See *United States* v. *United Mine Workers*, 330 U.S. 258, 295 (1947); *St. Regis Paper Co.*, 717 F.2d at 1303; cf. *Scott & Fetzer Co.* v. *Dile*, 643 F.2d 670, 675 & n.8 (9th Cir. 1981) (collecting cases).

Although there is, to be sure, some risk involved in undergoing civil contempt, that is what courts require for appeal in a variety of contexts. For example, a non-party witness seeking to challenge an unappealable interlocutory discovery order must "refuse to comply and submit to a contempt proceeding" to achieve the necessary finality to perfect an appeal. *FTC* v. *Alaska Land Leasing, Inc.*, 778 F.2d 577, 578 (10th Cir. 1985); see also *DeMasi* v. *Weiss*, 669 F.2d 114, 122 (3d Cir. 1982). Similarly, an employer seeking to challenge an OSHA search warrant may "refuse entry pursuant to the warrant and then challenge the warrant before the district court when the Secretary brings civil contempt proceedings." *Rockford Drop Forge Co.* v. *Donovan*, 672 F.2d 626, 631 (7th Cir. 1982). See also *United States* v. *Trinity Indus., Inc.*, 876 F.2d 1485, 1488-1489 (11th Cir. 1989) (Trinity incurred one day of $10,000 per day civil contempt assesment and Mosher Steel incurred one day of $1000 per day assessment rather than permit OSHA inspections pursuant to warrants); *Donovan* v. *Burlington Northern, Inc.*, 781 F.2d 680, 684 (9th Cir. 1986) (noting that resistance to valid OSHA warrant "need not be without financial risk even in a free society").

Under these circumstances, a *Munsingwear* order vacating the judgment was not required.[7] Indeed, several features of this case made it particularly

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[7] None of this Court's cases cited by petitioners (Pet. 3) involved situations comparable to that presented here. See *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92, 93 (1979) (per curiam) (challenge to order to arbitrate mooted by completition of arbitration); *Preiser* v. *Newkirk*, 422 U.S. 395 (1975) (prisoner challenging transfer decision to higher security facility was later transferred back to lower security facility); *Parker* v. *Ellis*, 362 U.S. 574 (1960) (per curiam) (prisoner petitioning for habeas corpus was released from custody); *United States* v. *Munsingwear*, *supra* (intervening change in law); *Duke Power Co.* v. *Greenwood County*, 299 U.S. 259, 267, 267-268 (1936) (because of post-judgment modification of challenged contract, district court judgment should have been vacated and action retried based on new contract).

In *New Left Educ. Project* v. *Board of Regents*, 472 F.2d 218 (5th Cir.), vacated, 414 U.S. 807 (1973), a district court struck down on constitutional grounds certain rules promulgated by a state university. While the case was on appeal, the university mooted the case by repealing the rules and adopting new ones. After the court of appeals declined to vacate the district court judgment—concluding (472 F.2d at 221) that the case did not become moot through "happenstance" but through the university's voluntary action—this Court summarily vacated the judgment, and remanded to the district court with directions to dismiss the case as moot. 414 U.S. 807. The *New Left* case implicated two concerns not present here. First, the judgment in question rested on constitutional grounds; its vacation is consistent with this Court's prudential concern to avoid pronouncements on constitutional issues when the case does not so require. Second, a public body's adoption of new regulations, even if consistent with a district court judgment, reflects public policy choices, and is not equivalent to a private party's decision to comply with a court order requiring testimony under subpoena. See *Clarke* v. *United States*, 915 F.2d 699, 706-708 (D.C. Cir. 1990) (en banc).

inappropriate for the relief petitioners sought. First, although petitioners did not appear to challenge on appeal the district court's rulings that Trinity could not intervene and that its attorneys could not represent the employees, see App., *infra*, 5a, they nonetheless sought to vacate all aspects of the judgment. Petitioners have no equitable interest in eliminating the preclusive force of rulings that they did not seek to challenge on appeal.[8] Second, the Secretary, as the prevailing party, has a strong interest in preserving the preclusive effect of the judgment as applied to other actions involving Trinity, which is, regrettably, a frequent litigant in OSHA enforcement authority cases.[9]

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[8] Although it is possible that the court of appeals could have disentangled the issues, and vacated only the aspects of the judgment to which petitioners objected, petitioners did not request partial vacatur, even in the alternative. Nor did they do so in their petition for rehearing or in their petition in this Court.

[9] See, *e.g.*, *Dole* v. *Trinity Indus., Inc.*, 904 F.2d 867 (3d Cir.), cert. denied, 111 S. Ct. 555 (1990); *Dole* v. *Trinity Indus., Inc.*, 898 F.2d 1049 (5th Cir. 1990); *United States* v. *Trinity Indus., Inc.*, 876 F.2d 1485 (11th Cir. 1989); *Industrial Steel Prods. Co.* v. *OSHA*, 845 F.2d 1330 (5th Cir.), cert. denied, 488 U.S. 993 (1988); *Donovan* v. *Trinity Indus., Inc.*, 824 F.2d 634 (8th Cir. 1987); *Donovan* v. *Mosher Steel Co.*, 791 F.2d 1535 (11th Cir. 1986), cert. denied, 479 U.S. 1030 (1987); *Donovan* v. *Hackney, Inc.*, 769 F.2d 650 (10th Cir. 1985), cert. denied, 475 U.S. 1081 (1986); see also Pet. App. A30. In fact, there have been two other cases thus far in which other Trinity employees have challenged the Secretary's subpoena authority and in which Trinity has sought to intervene. *Herman* v. *Dole*, Civ. Action No. 4-90-324-K (S.D. Tex. filed July 30, 1990) (action for declaratory and injunctive relief); *Dole* v. *Barrios*, 1990 O.S.H. Dec. (CCH) ¶ 29,052 (N.D. Tex. 1990).

We recognize that in some instances, courts of appeals have applied the *Munsingwear* procedure when a party first appealed an order requiring the production of information, and then mooted the case by complying with the order. See *In re Kulp Foundry, Inc.*, 691 F.2d 1125, 1128-1130, 1133 (3d Cir. 1982) (case became moot after an inspection warrant was fully executed; court vacated district court order directing compliance with the warrant); *United States* v. *Cleveland Elec. Illuminating Co.*, 689 F.2d 66, 68 (6th Cir. 1982) (per curiam) (same); *United States* v. *Kis*, 658 F.2d 526, 532-535 & n.20 (7th Cir. 1981) (compliance with IRS summons for handwriting exemplars mooted appeal; court remanded with instructions to vacate summons enforcement order), cert. denied, 455 U.S. 1018 (1982); *United States* v. *Silva & Silva Accounting Corp.*, 641 F.2d 710, 711 (9th Cir. 1981) (production of documents under IRS summons mooted appeal; court remanded with instructions to vacate enforcement order). But, unlike in this case, in none of those cases did the prevailing party appear to oppose the vacation of the underlying judgment and the dismissal of the enforcement action. The prevailing party's concurrence (or acquiescence) in a motion to vacate is an important consideration, because it is the prevailing party who stands to benefit most directly—through application of res judicata principles—from the preservation of the judgment.

The *Munsingwear* doctrine has always been applied with a view toward furthering its underlying purposes. As the purposes of the doctrine did not require vacation of the district court's judgment in this case—and, indeed, they strongly favor allowing the judgment to stand—further review of petitioners' claim is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

ROBERT P. DAVIS
Solicitor of Labor

ALLEN H. FELDMAN
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APRIL 1991

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. CA3-89-2539-D

ELIZABETH DOLE, Secretary of Labor,
United States Department of Labor, PLAINTIFF,

vs.

BENNY BAILEY, ET AL., DEFENDANTS.

[Filed Apr. 27, 1990]

ORDER

Before the court is defendants' motion to stay execution of proceedings to enforce the court's April 23, 1990 judgment pending appeal of that judgment to the Fifth Circuit. Defendants contend their right of appeal will be futile if a stay is not granted.

The United States Secretary of Labor ("Secretary") initiated this action against defendants, certain employees of Trinity Industries, Inc. ("Trinity"), seeking to enforce administrative subpoenas issued pursuant to 29 U.S.C. § 657(b). The court referred various matters to the United States Magistrate pursuant to 28 U.S.C. § 636(b), and in a memorandum opinion and order entered April 9, 1990, affirmed *inter alia* the magistrate's recommendation that the subpoenas be enforced. Final judgment was thereafter entered.

Defendants filed their notice of appeal to the Fifth Circuit on April 25, 1990, and now seek to stay enforcement of the court's judgment pending appeal. Because the Secretary seeks only declaratory or injunctive-type relief through this action, the decision whether to grant a stay pending appeal is discretionary with the court. 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2905 (1973 and Supp. 1990); Fed. R. Civ. P. 62(a) and (c). In exercising its discretion, the court utilizes the same factors employed by the circuit court in determining whether to grant a stay under Fed. R. App. P. 8(a). In order to obtain a stay, the moving party must demonstrate: (1) that it is likely to succeed on the merits; (2) that it would suffer irreparable injury if the stay were not granted; (3) that granting the stay would not substantially harm the other parties; and (4) that granting the stay would serve the public interest. *National Treasury Employees Union v. Von Raab*, 808 F.2d 1057, 1059 (5th Cir. 1987).

The court need only address the first and fourth factors. Defendants have presented no authority to suggest they are likely to succeed on the merits. Given the express language of § 657(b), defendants' success is unlikely indeed. Nor have defendants attempted to explain how granting a stay will serve the public interest. Enforcing the subpoenas and thus allowing the disputed interviews to take place can only serve the public interest, particularly if the interviews uncover safety deficiencies in Trinity's facilities. On the other hand, granting a stay and thus *not* allowing the interviews to take place truly serves the interests of but one party—Trinity.

Because defendants have not satisfied—indeed have not attempted to satisfy—the relevant factors, defendants' motion for a stay pending appeal is denied.

SO ORDERED.

April 27, 1990.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-1326

ELIZABETH DOLE, Secretary of Labor,
U.S. Department of Labor, PLAINTIFF-APPELLEE,

versus

BENNY BAILEY, ET AL., DEFENDANTS-APPELLANTS.

[Filed Apr. 30, 1990]

Appeal from the United States District Court for the Northern District of Texas

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Before HIGGINBOTHAM, SMITH and BARKSDALE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellant(s) for stay pending appeal is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. CA3-89-2539-D

ELIZABETH DOLE, Secretary of Labor,
United States Department of Labor, PLAINTIFF,

v.

BENNY BAILEY, ET AL., DEFENDANTS.

[Filed Apr. 25, 1990]

NOTICE OF APPEAL

Notice is hereby given that Defendants Benny Bailey, Jerry Calloway, Israel Casinono, Donald Collier, Emmett Combs, Labon V. Cook, Victor Lopez, Sidney Robertson, Charlie Sandoval, C.L. Sheigg, William Square, Lindsay Williams, and Paul Williams hereby appeal to the United States Court of Appeals for the Fifth Circuit from the district court's denial of Defendants' Motion to Dismiss and the grant of the Secretary of Labor's Motion to Enforce Subpoenas, entered the 23rd day of April, 1990.

Dated this 25th day of April, 1990

Respectfully submitted,

LOCKE PURNELL RAIN
HARRELL
(A Professional Corporation)

/s/ A. Darby Dickerson
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this pleading was sent via First Class Mail to Robert A. Fitz, counsel for the Secretary of Labor, this 25th day of April, 1990.

/s/ A. Darby Dickerson
A. DARBY DICKERSON

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